No. 17-494

In the Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF BRILL, KNOLL, MASON, AND VIARD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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OTHER AUTHORITIES

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Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*,
103 Va. L. Rev. 309 (2017) 7, 8

Ryan Lirette & Alan D. Viard, *Putting the Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 J.L. & Pol'y 467
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Ruth Mason & Michael S. Knoll, *What is Tax Discrimination?*, 121 Yale L.J. 1014 (2012) 8

South Dakota Dep't of Revenue, Sales and Use Tax Guide (July 2017), http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/STGuide.pdf
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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars who specialize in the economic analysis of tax law and tax policy and who submitted two *amicus* briefs explaining the economic concept of tax neutrality that the Court considered and cited in support of its opinion in the case *Comptroller of the Treasury v. Wynne*.[2] *Amici* submit this brief to assist the Court in assessing the various economic and policy arguments advanced in this case using the same method of inquiry. In particular, the neutrality principle that was important to the Court's reasoning in *Wynne* supports upholding South Dakota's Senate Bill 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016) ("S.B. 106").

Alex Brill is a Resident Fellow at the American Enterprise Institute for Public Policy Research ("AEI"). Previously, he served as senior advisor and chief economist to the Committee on Ways and Means of the U.S. House of Representatives and on the staff of the President's Council of Economic Advisers.

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[1] Petitioner and Respondents have given blanket consent for the filing of *amicus curiae* briefs. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to its preparation or submission.

[2] *See Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1802, 1804, 1806 (2015) (citing Brief Of The Tax Economists As *Amici Curiae* In Support Of Respondents ("Tax Economists *Wynne* Br."); Brief Of Michael S. Knoll And Ruth Mason As *Amici Curiae* In Support Of Respondents ("Knoll & Mason *Wynne* Br.")).

Michael S. Knoll is Theodore Warner Professor, University of Pennsylvania Law School; Professor of Real Estate, The Wharton School; and Co-director, Center for Tax Law and Policy, University of Pennsylvania.

Ruth Mason is Class of 1957 Research Professor of Law at the University of Virginia School of Law.

Alan D. Viard is a Resident Scholar at AEI. Dr. Viard previously served as Visiting Scholar at the U.S. Treasury Department Office of Tax Policy; a senior economist at the President's Council of Economic Advisers; a senior economist at the Federal Reserve Bank of Dallas; an assistant professor of economics at Ohio State University; and an economist for the Joint Committee on Taxation of the U.S. Congress.

SUMMARY OF THE ARGUMENT

The passage of time and changing circumstances have rendered the physical-presence requirement articulated in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 758 (1967), and *Quill Corporation v. North Dakota*, 504 U.S. 298, 324-15 (1992), a harmful anachronism. Standard tools of economic analysis that the Court considered in *Comptroller of the Treasury v. Wynne* reveal that South Dakota's sales and use tax regime,[3] as amended by S.B. 106, promotes neutral treatment of in-state and interstate commerce. By contrast, the bright-line physical-presence requirement set forth in *Bellas Hess*

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[3] For purposes of this brief, we use "sales tax" to describe any tax collected and remitted by the seller and "use tax" to describe any tax remitted by the consumer.

and *Quill* forces states to extend what is in practice a discriminatory subsidy in favor of a specific class of out-of-state sellers, namely, those sellers who lack a physical presence within the state. On the facts of the challenged statute, there is no valid economic reason to mandate such a discriminatory subsidy.

While there once may have been sufficient concerns as to whether sales tax compliance costs would impose an undue burden on out-of-state sellers so as to justify a bright-line physical-presence rule, such concerns no longer exist here. Given the specific features of South Dakota's sales and use tax regime and the state's adherence to the Streamlined Sales and Use Tax Agreement ("SSUTA"), there is no credible argument that the South Dakota tax regime is excessively burdensome on remote sellers. From an economic standpoint, a bright-line physical-presence requirement prohibiting S.B. 106 makes no sense.

The Court has, in analogous circumstances, utilized the flexible balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), to assess whether a given state law imposes an undue burden on interstate commerce. Such an approach is warranted here. Under the balancing test, South Dakota's important state interest in collecting sales taxes outweighs the minimal tax compliance burden on out-of-state sellers. S.B. 106 should therefore be upheld.

STATEMENT OF THE CASE

More than fifty years ago, the Court held in *Bellas Hess* that a state may not "impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail." 386 U.S. at 758. Twenty-five years later, the Court in *Quill* upheld *Bellas Hess*'s so-called "physical-presence requirement" on the ground that its "bright-line rule . . . furthers the ends of the dormant Commerce Clause" by "demarcat[ing] a discrete realm of commercial activity that is free from interstate taxation." 504 U.S. at 314-15.

In 2016, the South Dakota legislature passed S.B. 106 in response to the loss of sales and use tax revenue resulting from the increasing volume of purchases from out-of-state sellers without a physical presence within the state. The legislature enacted S.B. 106 with the express purpose of directly challenging the Supreme Court's "doctrine that prevents states from requiring remote sellers to collect sales tax." S.B. 106 § 8(7). S.B. 106 required any seller that "does not have a physical presence in the state" to collect and remit sales tax if the seller met certain sales thresholds during the previous or current calendar year. *See id.* § 1 (to trigger collection requirement, sellers must have $100,000 in sales or 200 separate transactions delivered into the state during the previous or current year).

S.B. 106 included legislative findings regarding South Dakota's "inability to effectively collect the sales or use tax from remote sellers," *id.* § 8(1), and the decreasing cost to remote sellers of collecting sales tax,

id. § 8(6). It also provided South Dakota a right of action to sue out-of-state sellers who failed to comply, *id.* § 2, an expeditious hearing and appeal process, *id.* §§ 2, 4, an automatic injunction staying the law's enforcement during the pendency of any legal challenge to the law, *id.* § 3, and express protections against retroactive tax collection, *id.* § 5.

In April 2016, South Dakota sued four out-of-state sellers that lacked a physical presence in the state and had failed to comply with S.B. 106. *South Dakota v. Wayfair, Inc.*, 901 N.W.2d 754, 759 (S.D. 2017). South Dakota sought a declaratory judgment affirming the law's validity. *Id.* In exchange for dismissal from the action, one of the sellers voluntarily registered for a sales tax license and immediately began collecting the taxes required by S.B. 106. *Id.* The other three sellers moved for summary judgment, arguing that S.B. 106 was unconstitutional under *Quill*. *Id.* at 759-60.

On summary judgment, the sellers stipulated that they (1) lacked any physical presence in South Dakota; (2) had gross revenue in 2015 from the sale of tangible personal property delivered into South Dakota in excess of $100,000 and/or sold tangible personal property for delivery into South Dakota in 200 or more transactions; and (3) were not registered to collect South Dakota's sales tax. *Id.* The South Dakota Circuit Court granted the sellers' motion for summary judgment, and the South Dakota Supreme Court affirmed. *Id.* at 756.

ARGUMENT

I. S.B. 106 Promotes A Neutral Playing Field For Interstate Commerce While *Bellas Hess* and *Quill* Mandate A Discriminatory Subsidy.

An animating concern underlying the Court's dormant Commerce Clause jurisprudence is the "maint[enance of] state boundaries as a neutral factor in economic decisionmaking." *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 283 (1987). In essence, this principle "precludes States from discriminat[ing] between transactions on the basis of some interstate element." *Wynne*, 135 S. Ct. at 1794 (citation and internal quotation marks omitted). Technically, "[t]his means . . . that a State 'may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Id.* (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)).

There can be no question that S.B. 106 better comports with the goal of making state boundaries neutral as to economic decisionmaking than does the *Bellas Hess-Quill* physical-presence requirement. This is clear from the type of neutrality analysis that *amici* provided and the Court considered and cited in support of its decision in *Wynne*.[4] Specifically, the Court in *Wynne* reaffirmed its internal consistency test as a practical tool that "helps courts identify tax schemes that discriminate against interstate commerce." 135 S. Ct. at 1802. The Court noted that the test "allows courts to isolate the effect of a defendant State's tax

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[4] *See Wynne*, 135 S. Ct. at 1802, 1804, 1806 (citing Tax Economists *Wynne* Br.; Knoll & Mason *Wynne* Br.).

scheme" by "hypothetically assuming that every State has the same tax structure" and "see[ing] whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.* (citation and internal quotation marks omitted).

Although the internal consistency test has its origins in assessing whether multistate taxation of a unitary enterprise is fairly apportioned, *see id.* at 1801-02, as *amici* explained in *Wynne*, the test is actually a reliable indicator of whether any form of taxation is neutral as to interstate commerce.[5] The hypothetical assumption embedded in the internal consistency test—that all other states adopt the challenged state's tax regime—is really an inquiry into whether the tax on residents' in-state activity is equal to the combined taxes on residents' out-of-state activity and nonresidents' in-state activity.[6] As such, the internal

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[5] *See* Tax Economists *Wynne* Br. 23-27; Knoll & Mason *Wynne* Br. 19-24.

[6] The internal consistency test allows the Court to identify neutral tax regimes by recognizing that interstate commerce flows in two directions across state lines: inbound and outbound. By assuming hypothetically that every state adopts the same tax regime, the test allows the Court to compare that regime's combined burden on inbound *and* outbound interstate commerce to the burden on purely in-state commerce. A neutral tax regime will satisfy the internal consistency test because the combined burden on interstate commerce will be equal to the burden on purely in-state commerce, reflecting a possibility that prices will adjust to preserve incentives to engage in cross-border activity. The test provides an accurate evaluation of the tax regime's neutrality, whether or not other states adopt that regime. *See* Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant*

consistency test reflects an important economic insight, namely, that a discriminatory tax cannot be identified by looking solely at how it operates in one market.[7] Rather, to determine whether a tax regime discriminates, one must take into account the fact that a given state tax rule may change incentives for out-of-state actors to do business within the state *and* also may change incentives for in-state actors to do business outside the state. To avoid discouraging cross-border commerce, the tax on residents' in-state activities must equal or exceed the combined tax on residents' out-of-state activities and nonresidents' in-state activities, which is equivalent to satisfying the internal consistency test.

A quintessentially neutral tax—namely, a destination-based tax that applies to all goods sold in a state regardless of their origin—illustrates the point. Even though such a tax may discourage sales and consumption within the taxing state, the tax is nevertheless neutral because it applies equally to residents' in-state sales and to all sales into the state. Consider, for example, widgets sold for $100 apiece in two hypothetical states, A and B. Suppose that State

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Commerce Clause, 103 Va. L. Rev. 309, 326-30 (2017); Ryan Lirette & Alan D. Viard, *Putting the Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 J.L. & Pol'y 467, 495-500 (2016).

[7] *See* Knoll & Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 Va. L. Rev. at 318-26; Lirette & Viard, *Putting the Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 J.L. & Pol'y at 477-86; Ruth Mason & Michael S. Knoll, *What is Tax Discrimination?*, 121 Yale L.J. 1014, 1051-71 (2012).

A imposed a 20 percent excise tax on the sale or use of widgets in State A. If the price of widgets in State A rose to $125 in response to the tax, then sellers from both states would continue to have the same incentive to sell widgets in State A as in State B. State-B sellers would receive $100 after paying $25 in tax in State A. State-B sellers would receive the same $100 in State B that they would earn in State A. Similarly, State-A sellers would also receive $100 after tax in State A, and they would earn $100 without tax in State B. Thus, everyone's incentive to engage in cross-border activity could be preserved.[8] Indeed, that incentive would persist even if the price in State A did not rise to $125. If, for some reason, the price remained at $100 in both states, then sellers from both states would prefer to sell in State B, but all sellers would receive the same net after-tax price in State A ($80) and State B ($100). Although the tax would discourage sellers in State B from selling across state lines, it would encourage sellers in State A to do so. On balance, the tax would not discourage interstate commerce relative to in-state commerce and therefore would not be discriminatory.

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[8] The Tax Economists have described the neutrality condition as satisfied when a tax creates the possibility for prices of commercial activity to adjust so there would be no incentive to shift from cross-border to purely within-state activity—or vice versa. *See* Tax Economists *Wynne* Br. 12-13. Knoll and Mason have described the neutrality condition as satisfied when both in-state and out-of-state sellers retain the same share of proceeds on commercial activity occurring in the state and commercial activity occurring outside the state. *See* Knoll & Mason *Wynne* Br. 14-16. The two descriptions are equivalent because prices can adjust as required by the Tax Economists' condition only when tax rates satisfy the Knoll and Mason condition.

By contrast, a discriminatory tax necessarily distorts incentives to engage in cross-border activity. If State A imposed a 20 percent tariff on the import of widgets from State B, interstate commerce would suffer even if widget prices in State A rose to $125. Because the tariff would not apply equally to State-A sellers' in-state sales of widgets, State-A sellers would prefer to sell in State A at $125 per widget rather than in State B at $100 per widget, whereas State-B sellers would be indifferent to where they sell because they would receive $100 after taxes in both states. With such a tariff, cross-border sales would be discouraged at any set of prices. Whatever the price, either State-A sellers would prefer to sell in State A or State-B sellers would prefer to sell in State B, or both.[9]

The internal consistency test succeeds as a substantive matter because it replicates this analysis. Applying that test to the hypothetical sales tax above, if all states adopted a 20 percent sales tax, then both in-state and cross-border sales would be taxed at 20 percent. Conversely, if all states adopted a 20 percent tariff, then in-state sales would be untaxed while cross-border sales would be taxed at 20 percent. Thus, the internal consistency test confirms what the above economic analysis shows: uniform sales and use taxes do not discourage cross-border commerce whereas tariffs do.

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[9] If, for example, the price in State A remained $100, then State-A sellers would have an equal incentive to sell in both states, but State-B sellers would prefer to sell in State B where they would receive $100, rather than in State A where they would receive only $80 after tax.

Applying these tools to this case highlights the important difference between South Dakota's sales and use tax regime under S.B. 106 and that same regime with a physical-presence requirement consistent with *Bellas Hess* and *Quill*. Under S.B. 106, South Dakota levies sales tax at the item's destination (*i.e.*, South Dakota)—whether the seller is in-state or out-of-state—and exempts in-state sellers' out-of-state sales from taxation.[10] Under S.B. 106, South Dakota thereby imposes the neutral destination-based sales tax featured in the above example.[11]

As a formal matter, South Dakota's regime without S.B. 106 is similar to this neutral regime. Although the physical-presence requirement imposed by *Bellas Hess* and *Quill* excuses sellers without a physical presence in South Dakota from collecting and remitting sales tax, consumers in South Dakota still owe use tax on all

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[10] *See* S.D. Codified Laws § 10-45-2 (2018) (imposing a tax on "the gross receipts of all sales of tangible personal property consisting of goods, wares, or merchandise, except as otherwise provided in this chapter, *sold at retail in the State of South Dakota to consumers or users*") (emphasis added); South Dakota Dep't of Revenue, Sales and Use Tax Guide 3 (July 2017), http://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/STGuide.pdf ("Sales delivered to a location outside South Dakota are not subject to South Dakota sales tax, but may be subject to that state's tax.").

[11] We note that the South Dakota tax regime, as amended by S.B. 106, is still not entirely neutral, as it continues to excuse small out-of-state sellers that do not meet certain minimum sales threshold requirements from collecting and remitting sales tax. *See* S.B. 106 § 1.

items they purchase in or have shipped to the state.[12] Thus, all sales—whether made by in-state sellers, out-of-state sellers with a physical presence in the state, or out-of-state sellers without a physical presence—are formally subject to tax at the same rate.

As a practical matter, however, the two tax regimes are starkly different from the standpoint of neutrality. This is because there is no effective way to collect the use tax imposed on in-state consumers who purchase from remote sellers. As the state legislature found in adopting S.B. 106, "[d]espite the fact that a use tax is owed . . . many remote sellers actively market sales as tax free or no sales tax transactions." S.B. 106 § 8(3); *see also* Walter Hellerstein et al., State and Local Taxation: Cases and Materials 814 (10th ed. 2014) ("With the exception of property that has to be registered, such as automobiles, boats, and airplanes, the practical problems of preventing use tax evasion in cases of goods bought in other states have proved extremely difficult."). *Bellas Hess* and *Quill* preclude South Dakota from requiring remote sellers to collect and remit the applicable tax unless they have a physical presence in the state. This physical-presence requirement effectively mandates a subsidy in favor of interstate commerce. Such a subsidy is the mathematical mirror image of a discriminatory tariff and so necessarily changes incentives to engage in

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[12] This Court has upheld the constitutionality of non-discriminatory use taxes. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937) ("Things acquired or transported in interstate commerce may be subjected to a property tax, nondiscriminatory in its operation, when they have become part of the common mass of property within the state of destination.").

interstate commerce. As a result of these decisions, out-of-state sellers without a physical presence in South Dakota gained a tax advantage over two other groups: (1) in-state sellers and (2) out-of-state sellers with a physical presence in South Dakota. S.B. 106 simply levels the playing field among in-state sellers, out-of-state sellers with a physical presence in South Dakota, and out-of-state sellers without a physical presence in the state.

Neither the internal consistency test specifically nor the dormant Commerce Clause generally prohibits states from enacting laws that discriminate in favor of interstate commerce over domestic commerce. *Wynne*, 135 S. Ct. at 1802; *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 652 n.4 (1994). It does not follow, however, that the Constitution should require states to so discriminate. There is no valid economic reason to make that logical leap. Indeed, the non-neutral nature of the physical-presence requirement leads to the many distortions identified by Petitioners and other *amici* in this case. Favoring out-of-state sellers who lack a physical presence in a state suppresses interstate activity by discouraging companies from building stores, using warehouses, contracting for warehouse services, or otherwise creating a physical presence in that state. *See* Petitioner's Brief ("Pet. Br.") 33-34; Brief of *Amici Curiae* Law Professors and Economists In Support Of Petitioner ("Professors & Economists Br.") 16-18. Favoring out-of-state sellers also leads to economic waste by encouraging consumers to buy and ship items from remote sellers rather than sellers in their own neighborhood. *See* Pet. Br. 35-36; Professors & Economists Br. 13-16. Further, by shifting to

consumers the administrative burden of collecting the use tax, the physical-presence requirement may actually increase compliance and enforcement costs rather than decrease them. *See* Professors & Economists Br. 18-21.

These economic ills occur because the physical-presence requirement contravenes the aim of neutrality. In keeping with underlying dormant Commerce Clause principles, the Court should therefore uphold S.B. 106.

II. S.B. 106's Minimal Compliance Burden Should Be Assessed Under A Balancing Test Rather Than Under A Bright-Line Rule.

The Court's driving concern in establishing the bright-line physical-presence requirement at issue here was to avoid "[u]ndue burdens on interstate commerce." *Quill*, 504 U.S. at 314-15; *see also Bellas Hess*, 386 U.S. at 756 (out-of-state seller argued that requiring it to collect and remit sales tax created "an unconstitutional burden on interstate commerce"). In particular, the Court was concerned that requiring sellers with no in-state physical presence to collect and remit taxes "could entangle [those sellers'] interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'" *Bellas Hess*, 386 U.S. at 759-60. The Court also hoped that a bright-line rule would "encourage[] settled expectations and, in doing

so, foster[] investment by businesses and individuals." *Quill*, 504 U.S. at 316.[13]

On the facts presented in this case, the burden on out-of-state sellers of complying with South Dakota's sales and use tax regime is negligible. South Dakota is a full member of the Streamlined Sales and Use Tax Agreement.[14] SSUTA § 801; *see also* S.D. Codified

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[13] In *Quill*, the Court acknowledged that it had not adopted a physical-presence requirement for any type of tax other than sales and use taxes. 504 U.S. at 314, 317. The Court's dormant Commerce Clause jurisprudence, however, does not draw such formalistic distinctions in other situations between taxes with economically equivalent impacts on interstate commerce. In *Wynne*, for example, the Court specifically rejected arguments that attempted to distinguish an income tax that operated like a tariff from actual tariffs. *See* 135 S. Ct. at 1804 ("Maryland has offered no reason why our analysis should change because we deal with an income tax rather than a formal tariff, and we see none."). The Court has also rejected similar formalistic arguments in other dormant Commerce Clause contexts. *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 574 (1997) ("A tax on real estate, *like any other tax*, may impermissibly burden interstate commerce.") (emphasis added); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 404 (1984) (states cannot "circumvent the prohibition of the Commerce Clause against placing burdensome taxes on out-of-state transactions by burdening those transactions with a tax that is levied in the aggregate . . . rather than on individual transactions"). *Bellas Hess* and *Quill* impose a bright-line physical-presence requirement on the ability to collect sales taxes, but this requirement applies to no other kind of tax. That requirement is therefore inconsistent with these other cases.

[14] The text of the SSUTA, as amended on December 19, 2017, is available at http://www.streamlinedsalestax.org/index.php?page=modules. A list of the states that are full members of the SSUTA is available at http://www.streamlinedsalestax.org/index.php?page=gen6.

Laws § 10-45C-3 (2018) (directing South Dakota's Department of Revenue to enter into the SSUTA). The SSUTA is a multistate agreement that "simplif[ies] and modernize[s] sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance." SSUTA § 102. As one of twenty-three full members of the SSUTA, South Dakota has adopted certain features to simplify and standardize the administration of sales tax and minimize the recordkeeping burden on sellers. *See, e.g.*, *id.* § 301 (state-level administration for sales and use taxes); *id.* § 308 (standardized state-wide tax rates); *id.* § 316 (standardized state-wide exemptions). The SSUTA provides for a centralized online registry where sellers can agree to collect and remit sales taxes for all taxable sales in the member states. *Id.* § 401. Importantly, the SSUTA allows out-of-state sellers to use approved service providers—paid for by the state, not the sellers—to handle the work of collecting and remitting taxes, *id.* §§ 203, 501, and it relieves sellers from liability for any errors by those service providers, *id.* §§ 306, 502.

South Dakota's membership in the SSUTA significantly reduces the compliance burden for out-of-state sellers like the Respondents in this case. In addition, by standardizing and centralizing sales tax administration, the states that are full members of the SSUTA have reduced the marginal cost to out-of-state sellers of complying with sales tax rules in additional SSUTA states. Once an out-of-state seller registers with the SSUTA for purposes of selling in South Dakota, compliance with South Dakota's sales tax regime or the regime of any other SSUTA state involves only a minimal burden.

In addition to the streamlined, centralized tax administration provided by the SSUTA, S.B. 106 contains protections for small out-of-state businesses that sell in South Dakota by exempting sellers that do not meet bright-line minimum sales thresholds. *See* S.B. 106 § 1 (200 sales or $100,000 in sales per year delivered in the state). Further, S.B. 106 creates no obligation to remit retroactive sales tax. *Id.* § 5.

The physical-presence requirement is poorly suited to address compliance burdens because that rule automatically precludes any statute akin to S.B. 106 no matter how small a burden it may impose on interstate commerce and no matter what its pro-competitive or other benefits may be. The Court can better achieve the objective of safeguarding interstate commerce from tax compliance burdens by utilizing instead the more flexible balancing test it has applied in analogous dormant Commerce Clause cases. The logic of these cases, which arise in the context of state regulation of interstate commerce, applies equally here in assessing whether the compliance costs of an otherwise neutral state tax unduly burden interstate commerce.[15]

In *Pike v. Bruce Church, Inc.*, the Court struck down an Arizona regulation requiring that any

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[15] The court's reasoning in *Complete Auto Transit, Inc. v. Brady* is consistent with the approach of separately assessing (i) whether a tax is discriminatory and (ii) whether the tax imposes an undue burden on interstate commerce. *See* 430 U.S. 274, 278 (1977) (observing that appellant "does not claim that discrimination or undue burden exists in fact"). In any event, *amici* agree with Petitioner that S.B. 106 satisfies the four-part test elsewhere articulated in *Complete Auto*. *See* Pet. Br. 22-24; *Complete Auto*, 430 U.S. at 279.

cantaloupe grown in Arizona and offered for sale must be packed in that state, thereby prohibiting the appellee in that case from packing its Arizona-grown cantaloupes in a nearby California facility. 397 U.S. at 138-39. Because the regulation at issue in *Pike* applied to any in-state or out-of-state person who grew cantaloupes in Arizona, it was neutral and non-discriminatory on its face. The Court nevertheless held that the regulation was contrary to the dormant Commerce Clause because the cost of compliance imposed an undue burden on interstate commerce. *Id.* at 140-42. Rather than impose a bright-line rule, the Court assessed the constitutionality of the regulation by balancing the regulation's benefits to the state against its burden on interstate commerce.[16] Applying that test to the facts of the case, the Court held that Arizona's legitimate interest in protecting cantaloupe growers from reputational injuries stemming from deceptive packaging did not outweigh the heavy burden on interstate commerce, and hence the regulation violated the dormant Commerce Clause. *Id.* at 145.

In *Bibb v. Navajo Freight Lines, Inc.*, the Court struck down an Illinois regulation requiring trucking companies to install curved mudguards on all trucks

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[16] *See Pike*, 397 U.S. at 142 ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.") (citations omitted).

because it was mutually inconsistent with the straight mudguards required in Arkansas and permitted in at least forty-four other states. 359 U.S. 520, 523, 529-30 (1959). Although the Illinois regulation was non-discriminatory, the Court determined that cross-border trucking companies could not simultaneously satisfy Illinois' requirement for curved mudguards and Arkansas' requirement for straight mudguards, thereby placing a "heavy burden . . . on the interstate movement of trucks and trailers." *Id.* at 527, 530. Hence, the regulation imposed an unconstitutional burden on interstate commerce. *Id.*

Neither *Bibb*'s nor *Pike*'s holding required the state to abandon the government interest that justified adopting the challenged regulations in the first place. The safety interest that motivated Illinois to adopt the curved mudguard rule in *Bibb* could be satisfied (at least in part) by Illinois' adoption of a straight mudguard requirement that would conform with the regulations of other states. *See id.* at 529-30. In *Pike*, Arizona sought to protect the reputation of Arizona farmers. But this interest could be served, at least to some extent, by enacting less restrictive measures. *See Pike*, 397 U.S. at 143 (noting that Arizona could ban the interstate sale of "unfit goods"). No such substitution can be made to protect South Dakota's interest in collecting taxes in light of *Bellas Hess* and *Quill*. If this Court upholds the physical-presence requirement, the practical result is that South Dakota must abandon its sovereign entitlement to tax items sold into its state by out-of-state sellers with no physical presence, no matter how much business those sellers do in South Dakota. There is no practical alternative to imposing upon out-of-state sellers the

obligation to collect sales taxes. As such, the state would lose the undeniable benefits of sales tax collection. The minimal burden on interstate commerce resulting from tax compliance in this case does not outweigh that interest.

CONCLUSION

Amici therefore respectfully submit that the Court should reverse the judgment of the Supreme Court of South Dakota.

Respectfully submitted,

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